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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. .....

H. L. PARKER, SUPERINTENDENT,
SHELBY COUNTY JAIL,

Petitioner,

v.

WILLIE GLINSEY,

Respondent,

H. L. PARKER, SUPERINTENDENT,
SHELBY COUNTY JAIL,

Petitioner,

v.

EUAN BAILEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, H. L. Parker, Superintendent, Shelby County Jail, respectfully prays that a writ of certiorari

issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 13, 1974.

OPINION BELOW

The opinion of the Sixth Circuit, ... F.2d ..., not yet reported, is reproduced as Appendix A. The Memorandum decision of the District Court of May 3, 1973, is attached as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 13, 1974. This petition for a writ of certiorari is timely filed within ninety (90) days of that date. Jurisdiction is invoked under the provisions of 28 U.S.C. Section 1254 (1) and Rule 19 (1)(b), Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1) May a defendant in police custody, charged jointly with other co-defendants with armed robbery, after being fully advised of his *Miranda* rights, ratify or adopt a co-defendant's confession, made in defendant's presence, by himself voluntarily giving a substantially identical confession, without violating the *Miranda* rule?

2) If so, does the admission into evidence at a joint trial of all defendants of the confession of the co-defendant so adopted and ratified by the defendant, along with defendant's adopting or ratifying confession, violate the rule established in *Bruton v. United States*, as interpreted by *Dutton v. Evans*, where the co-defendant giving the initial confession adopted and ratified does not take the stand?

3) If there is no ratification or adoption, is the admission into evidence of the non-testifying co-defendant's confession harmless error, where the defendant himself gives a substantially identical confession as that of his co-defendant, voluntarily given and in compliance with *Miranda*, and there is ample evidence that the crime was committed?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in pertinent part:

> "(N)or shall (any person) be compelled in any criminal case to be a witness against himself . . ."

The Sixth Amendment of the Constitution of the United States provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . . to be confronted with the witnesses against him . . ."

The Fourteenth Amendment of the Constitution of the United States provides in pertinent part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . ."

Habeas Corpus is codified in Title 28, United States Code, which provides in pertinent part:

> "*Section 2241. Power to grant writ.*
> "(a) Writs of habeas corpus may be granted by the

Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions . . . .

"(c) The writ of habeas corpus shall not extend to a prisoner unless ---

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ."

STATEMENT OF THE CASE

The respondents Willie Glinsey and Euan Bailey, along with Arthur Franklin, Frederick Johnson, John Edward Harris, and Larry Lee Hurd, were arrested by the Memphis Police Department and charged with various armed robberies, one of which was the subject of the District Court hearing herein. On May 10, 1971, these six defendants were jointly tried in State Court for one of these armed robbery charges, found guilty, and received from the jury as their punishment twelve (12) years in the State Penitentiary, two (2) years more than the minimum punishment for armed robbery under Tennessee law. Confessions of all six defendants, unredacted, were introduced at the trial. These confessions were substantially identical in content. John Edward Harris and Larry Lee Hurd pleaded guilty and went to trial on punishment only, as did Frederick Johnson, as they had the right to do under Tennessee law. Neither Harris, Hurd, nor Johnson testified. Respondents Glinsey and Bailey, along with Arthur Franklin, testified and repudiated their confessions. All confessions were introduced with appropriate limiting instructions by the Trial Judge. All confessions were found to be voluntary and in compliance with *Miranda* by the State Court, the District Court, and the Court of Appeals.

The proof showed that John Edward Harris and Larry Lee Hurd were arrested for another robbery and confessed to numerous other robberies, implicating Willie Glinsey, Euan Bailey, Arthur Franklin, and Frederick Johnson, as the result of which these four were arrested.

The District Court found that all six were brought to the police station and asked to be left alone to talk. Later they advised officers that they would all tell what they knew. Then an officer, with robbery reports in hand, simply asked the group, after describing a robbery, which defendants were involved, and certain ones would raise their hands, indicating they were. In this way, they all mutually agreed which were involved in which robberies. Officers then sorted out the men involved in a particular robbery and took handwritten, and then typed, statements, in the presence of each other participant in the particular robbery. These statements merely detailed what had already been told to the officers by various members of the group orally in the initial group conference. These statements were substantially identical with those given by other participants in the particular robbery. All were voluntary, and all were given after sufficient *Miranda* warnings.

The District Court found that, although the State Trial Court in an excess of caution, charged the jury that the Larry Lee Hurd and John Edward Harris confessions were not admissible against the other co-defendants, in reality they were admissible against co-defendants Willie Glinsey, Euan Bailey, Arthur Franklin and Frederick Johnson, because the confessions of John Edward Harris and Larry Lee Hurd were given in the presence of Glinsey, Bailey, Franklin and Johnson, who in turn gave identical confessions, under circumstances that indicated adoption by each of the statement of the other.

The District Court thus dismissed the Petitions of Willie Glinsey, Euan Bailey and Arthur Franklin, for writs of habeas corpus.

On Appeal, the United States Court of Appeals for the Sixth Circuit, after holding that all confessions were voluntarily given and in compliance with *Miranda* and that joint trial under these circumstances was not Federal Constitutional error, nevertheless held that it was error to admit the confessions of Larry Lee Hurd and John Edward Harris at this trial. The Court of Appeals further held that this was harmful error as to Willie Glinsey and Euan Bailey, but harmless error as to Arthur Franklin, and reversed as to Glinsey and Bailey. The basis for their decision apparently was note 37, in *Miranda v. Arizona*, 384 U.S. 436 (1966).

REASON FOR GRANTING THE WRIT

The District Court found as a fact that the confessions of John Edward Harris and Larry Lee Hurd were given in the presence of Willie Glinsey and Euan Bailey, as well as the other co-defendants, and that Willie Glinsey and Euan Bailey in turn gave identical confessions, under circumstances that indicated adoption by each of the statement of the other, thus making the confessions of John Edward Harris and Larry Lee Hurd admissible against Willie Glinsey and Euan Bailey. This finding of fact by the District Court was ignored or disregarded by the Court of Appeals, which instead, for reasons not apparent in the record, held that the silence of Willie Glinsey and Euan Bailey in the face of the confessions of John Edward Harris and Larry Lee Hurd was used against them at the State trial. It is submitted that this ruling is completely at odds with the facts, which were found by the District Court,

that there was an *adoption* or *ratification* of the confessions of John Edward Harris and Larry Lee Hurd by the giving of identical confessions by Willie Glinsey and Euan Bailey. Under these circumstances, *Miranda v. Arizona*, 384 U.S. 436 (1966), is not applicable since it is clear that all confessions of all defendants were given in compliance with *Miranda*.

It is established that one may expressly adopt another's statement as his own.

McCormick on Evidence, *1954*, page 525.

When it appears that a party clearly and unambiguously assented to or adopted the statements of another, evidence of those statements is admissible *against him*.

Jones on Evidence (6th Ed. Gard 1972), Section 13:28.

The *Model Code of Evidence 1942*, *Rule 507*, provides, where pertinent, as follows:

> "*Authorized and Adoptive Admissions*
> "Evidence of a hearsay statement is admissible against a party to the action if the judge finds that
> . . . . .
> "(b) The party with knowledge of the content of the statement by words or other conduct manifested his adoption or approval of the statement or his belief in its truth . . ."

Comment (b) thereof states:

> "The theory of adoptive admissions is that the hearsay declarations is in effect *repeated* by the party; his conduct is intended by him to express the same proposition as that stated by the declarant. (Emphasis added.)"

Even the new *Federal Rules of Evidence of 1973* affirm this proposition. Rule 801 reads, where pertinent:

"(d) *Statements which are not Hearsay.* A statement is not hearsay if --

"(2) *Admission by Party Opponent.* The statement is offered against a party and is ----

"(B) a statement of which he has manifested his adoption or belief in its truth . . ."

The conduct of a party in acting upon a statement submitted by another may as clearly indicate acceptance of its truth as if it had been originally made by the party himself.

Morgan, *Basic Problems of Evidence 1962*, pp. 269-270;

22 A C.J.S., Criminal Law, Section 768 (a), pp. 1153-1154.

Thus, where the co-defendant discusses details of the crime, in the presence of defendant, and the defendant then adds further details, the statements of each were common admissions of both and admissible against both. *People v. Osuna*, 76 Cal. Rptr. 462, 452 P.2d 678 (Traynor, C.J.). Where defendant agrees with co-defendant's confession and gives his own identical confession, both are admitted as the *confession of the defendant himself. Commonwealth v. Bethea*, Penn. Sup. Ct. 1969, 251 A.2d 727. This is not the same as an admission by silence. *State v. Thorne*, 43 Wash. 2d 47, 260 P.2d 331 (1953).

It is clear that an adoptive admission, as discussed above, is a recognized exception to the hearsay rule. The rule in *Miranda v. Arizona*, 384 U.S. 436 (1966) at page 468, note 37, only deals with the exception to the hearsay

rule, recognized by some jurisdiction, of *admissions by silence*, and does not deal with *adoptive admissions*.

Since adoptive admissions are recognized exceptions to the hearsay rule, they are not specifically dealt with in *Bruton v. United States*, 391 U.S. 123 (1968). *Miranda* deals with the constitutional right of counsel; *Bruton*, and other cases, deal with the Constitutional right to confront one's accusers.

While it is clear that the hearsay rule and the Confrontation Clause are not equated, they do stem from the same root. *Dutton v. Evans*, 400 U.S. 74, at p. 86 (1970). There are recognized exceptions to the right of confrontation. *Salinger v. United States*, 272 U.S. 542 (1926). These exceptions coincide with certain hearsay exceptions such as those recognized and approved in *Pointer v. Texas*, 380 U.S. 400 (1965), and numerous other following cases. This Court has embarked on a "careful scrutiny" of each exception to the hearsay rule, in light of the Confrontation Clause. *California v. Green*, 399 U.S. 149 (1970). The Court has looked for indicia of reliability in passing on these exceptions, with the purpose in mind to "advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier of fact (has) a satisfactory basis for evaluating the truth of the prior statement". *Dutton v. Evans*, 400 U.S. 74, at p. 89 (1970).

It is earnestly submitted that, in the instant case, *three* Courts having already found as a fact that all statements involved were given voluntarily and in compliance with *Miranda*, it was error on the part of the Court of Appeals to reverse these convictions. The admission into evidence against these defendants Glinsey and Bailey of the confessions of other non-testifying co-defendants were

properly admitted as adoptive admissions. The District Court, after hearing proof, found *as a fact* that the confessions of these non-testifying co-defendants were adopted by these defendants Glinsey and Bailey. This finding of fact was disregarded by the Court of Appeals, without even a discussion of the evidence which supported this finding of fact.

Your respondent urges this Court to grant certiorari in this cause, since otherwise your respondent is remediless, in a cause in which there is no real question of the guilt of these defendants.

Your respondent submits further that, even if for some reason error is found here in the admission into evidence of the confessions of the non-testifying co-defendants against defendants Bailey and Glinsey, it is harmless error beyond a reasonable doubt, under the rule of *Harrington v. California*, 395 U.S. 250 (1969), and *Schneble v. Florida*, 405 U.S. 427 (1972).

It is true, as was stated in the Court of Appeals opinion, that there was no eyewitness testimony against Glinsey and Bailey. There was, however, proof of the robbery itself, and proof that there were at least four, and possibly six, male blacks who were involved in this robbery. What was completely ignored by the Court of Appeals, in its Harmless Error discussion, was that *Glinsey and Bailey both gave detailed confessions* of their *participation in this robbery, and that these confessions were internally consistent and substantially identical with* the confessions that the Court of Appeals held to have been erroneously introduced, requiring reversal. The Court of Appeals itself, along with *two trial courts*, held that *all* of these confessions, including those of defendants Glinsey and Bailey, were voluntarily given and in compliance with Miranda.

It is well established that once the existence of the crime is established (*corpus delicti*), the guilt of the accused could be based on his own otherwise uncorroborated confession. *Smith v. United States*, 348 U.S. 147 (1954). Therefore, even if the only proof in the case against defendants Glinsey and Bailey were the proof that a robbery had been committed and proof that defendants Glinsey and Bailey confessed to the robbery, this would be sufficient to sustain a conviction on appeal. It is submitted that this view is accepted to some degree, in *Schneble v. Florida*, 405 U.S. 427 (1972), when the Court said, at page 431 of 405 U.S.:

> ". . . without Schneble's confession and the resulting discovery of the body, the State's case against Schneble was virtually non-existent . . ."

It is earnestly submitted that there was no error of any kind in admitting the confessions of the non-testifying co-defendants in their joint trial with defendants Glinsey and Bailey. However, even if error is found, under *Schneble* it was harmless beyond a reasonable doubt. As in *Schneble*, these defendants Glinsey and Bailey gave full confessions. As in *Schneble*, the confessions of the non-testifying co-defendants at most tended to corroborate certain details of the confessions of defendants Glinsey and Bailey. As a matter of fact, all these confessions interlocked and were substantially identical.

It is submitted that this is the clearest possible case of the kind warned about by Mr. Justice Cardozo, quoted in *Dutton v. Evans*, 400 U.S. 74 (1970), at pages 89-90.

> "There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are

to nullify a sentence pronounced by a Court of competent jurisdiction in obedience to local law, and to set the guilty free . . . ."

CONCLUSION

The Court should issue a writ of certiorari to reverse the opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Appendix

[fol. 1]

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

WILLIE GLINSEY, JR.,
Petitioner

v.

CHIEF PARKER, Shelby County Jail,
Respondent

Civil C-72-266

* * *

EUAN BAILEY, JR.,
Petitioner

v.

CHIEF PARKER, Shelby County Jail,
Respondent

Civil C-72-293

* * *

ARTHUR H. FRANKLIN,
Petitioner

v.

CHIEF PARKER, Shelby County Jail,
Respondent

Civil C-72-296

MEMORANDUM DECISION AND ORDER

(Filed May 3, 1973)

Following this Court's opinion and order of October 27, 1972, ruling that an evidentiary hearing was necessary and appointing counsel for these three petitioners, Glinsey, Bailey, and Franklin, a hearing was set but had to be con-

tinued because of emergency medical treatment for one of petitioners. The hearing was then reset and was held on April 27 and 30, 1973.

As stated in our prior opinion, we were concerned with only three issues: (1) whether petitioners' *Miranda* and *Escobedo* rights were violated in the obtaining of confessions from them and whether in any event, their confessions were freely and voluntarily made; (2) whether [fol. 2] there was a violation of petitioners' due process rights in refusing to grant them a severance with respect to two co-defendants who were pleading guilty; and (3) whether petitioners' *Bruton* rights were violated in the admission into evidence with cautionary instructions of the confessions of the guilty-pleading co-defendants, implicating petitioners, since such co-defendants did not testify.

With respect to the question of the giving of *Miranda* warnings prior to the obtaining of the confessions that were introduced against petitioners, the state trial court's determination, which appears in the transcript, that adequate warnings were given must stand, as such determination satisfies the provisions of 28 U.S.C.A. §2254(d). Moreover, the proof at the evidentiary hearing here established that such warnings were given at arrest and again prior to all statements made by petitioners. As to *Escobedo*, the proof here showed that none of petitioners asked for counsel and were denied such before obtaining these confessions.

As indicated in our prior opinion, the question whether these confessions were freely and voluntarily given presented, on the record made in the state court, a serious question. However, in this court the state made a more complete presentation and a different picture emerges.

At around 9 p.m. on the night of December 8, 1969, one Hurd and Harris were arrested shortly after they had com-

mitted an armed robbery in Memphis and under circumstances that clearly indicated their guilt. Upon being interrogated, they admitted being involved in
[fol. 3] several other robberies and implicated petitioners as being involved in some of them. Since it appeared that Hurd and Harris were a bonanza of information, Lt. Hadaway and Detective Sullivan, who were off duty, were called in. They then, based on information they received from Hurd and Harris, arrested petitioners along with Fred Johnson[1] and one William Johnson in the early morning hours of December 9th.

While petitioners have contended that they were not taken to Juvenile Court until after noon that day and then only for ten minutes, it appears that Franklin and Bailey were checked in there between 4 and 5 a.m. and Glinsey at 8:45 a.m. The purpose of this visit was to give information to that court that these juveniles had been arrested, the nature of the charges, the identity of their parents, and to allow the authorities to examine them to see that they had not been injured.

When petitioners (with the Johnsons) were placed in a room with Hurd and Harris at the police station, they asked to be left alone to talk and later advised the officers that they, like Hurd and Harris, would tell what they knew. Then Lt. Hadaway, with robbery reports in his hand, simply asked the group, after describing a robbery, which were involved, and the petitioners and the others would raise their hands, indicating that they were. In this way, it appears, they all mutually agreed which were involved in which robberies. The officers made notes as they went along. (It developed that William Johnson was not actually

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[1]Fred Johnson was a petitioner here, but his petition has been heretofore dismissed.

[fol. 4] involved in any robbery and had only loaned a gun to one of the others; he was released.)

With the aid of Detectives Mosely and Richmond (both black officers), Hadaway and Detective Boykin began taking statements from each individual with respect to a single robbery, Mosely and Richmond handling some and Hadaway and Boykin handling others. These are referred to as "I" statements and are taken in such a way that they could be used in a situation in which it might not be allowed to use a "We" statement. These are in long hand, signed by petitioners, and each made such a confession with respect to the robbery involved here.

At 12:15 p.m. petitioners were taken to Juvenile Court and left there until 1:40. They had, contrary to their contention, at least the opportunity to have lunch. The Juvenile Court judge entered a detention order at 2 p.m. allowing the officers to jail petitioners at police headquarters rather than to return them to Juvenile Court custody; this was done because of the seriousness of the charges and the lack of security at Juvenile Court.

That afternoon "We" statements were taken from petitioners and Hurd and Harris with respect to some of the robberies, including the one involved here. These are typed statements and are likewise signed and were the ones used at the criminal trial.

At no time were any promises or threats made to petitioners and in particular, contrary to petitioners' contention, neither of the black officers pulled a pistol
[fol. 5] and pointed it at petitioners or otherwise threatened them.[2]

[2]Petitioners contend also that they either signed blank sheets or that they did not know what was written on the sheets. They all can read; and we believe this to be highly improbable. In any case, this would constitute a fact issue and does not involve a constitutional issue.

Thus it appears that petitioners had confessed to the robbery involved here in the morning of their arrest and shortly signed an "I" statement and then later in the afternoon a "We" statement. They, therefore, were not interrogated all day and then, while hungry and under threats, they did not for the first time make confessions. We recognize that petitioners were not taken before the Juvenile Court for a "probable cause" remand hearing (to determine whether they would be handled as adults) until a week later, but their right to be brought before a magistrate is not constitutional and is only a factor to weigh in the due process scale. Under the circumstances, we do not believe that the failure to take the petitioners before a magistrate before the confessions were given here was, alone or in conjunction with their age and other factors, a denial of due process or otherwise made their confessions other than free and voluntary.

Thus we find and conclude that the admission in evidence against them of petitioners' confessions was not a violation of their federal constitutional rights.[3]

As indicated, Hurd and Harris had decided
[fol. 6] to plead guilty to the armed robbery involved here prior to their trial with petitioners and Fred Johnson. Under Tennessee law, even with a guilty plea, the jury would fix the punishment. T.C.A. §40-2310. Armed robbery is a capital offense in Tennessee. The prosecutors had agreed that, in their arguments to the jury, they would suggest a sentence of 25 years for Hurd and Harris, but it was understood that it would still be up to the jury. When it was announced that Hurd and Harris

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[3] Since Hurd, Harris and Fred Johnson were handled in the same way as petitioners, their statements were likewise admissible against them.

were pleading guilty with punishment to be determined by the jury, counsel for petitioners moved for a severance from them on the ground that petitioners would be prejudiced by being tried with co-defendants who were admitting their guilt. Counsel for Hurd and Harris also moved for a severance on the ground that they would be prejudiced by being tried with petitioners and Johnson because evidence might come in by reason of their not guilty pleas that would cause the jury to increase the penalty as to Hurd and Harris. The trial judge denied all motions for a severance. The "We" confessions of all defendants were admitted as part of the State's proof, with admonition to the jury (and later in the charge) that each could be considered as evidence only against the confessor. Hurd and Harris did not testify but petitioners did testify and denied their confessions. Johnson pleaded guilty at the conclusion of all the proof with the same understanding with the prosecution that Hurd and Harris had. Counsel for petitioners argued to the jury that 25 years was too much time for any of the defendants and suggested 12 years if the jury should find petitioners guilty. The jury imposed a sentence of 12 years
[fol. 7] for all defendants, those who had pleaded guilty and petitioners who had pleaded not guilty.

On reflection, we do not believe that it was a denial of due process to refuse a severance to petitioners from their guilty pleading co-defendants, Hurd and Harris, and thereby to allow the same jury to try the guilt or innocence and to fix the punishment as to the petitioners and to only fix the punishment as to Hurd and Harris. We do not understand it to be a denial of due process for the jury to be told that severed defendants have pleaded guilty, with proper instructions that such pleas are not to be considered against defendants on trial, and it would appear that petitioners were in no worse position here. Nor is it a denial

of due process not to declare a mistrial when other co-defendants change their pleas to guilty during trial. *United States v. Kahn*, 381 F.2d 824 (7th Cir. 1967); *United States v. Johnson*, 451 F.2d 1321 (4th Cir. 1971). In any case, if there were a denial of due process, it would be because of the application of the *Bruton* principle to this situation. Accordingly, we will discuss this issue along with the issue as to whether it was a violation of the *Bruton* rule to allow the introduction into evidence of the confessions of Hurd and Harris which implicated petitioners.

In the *Bruton* case, as the Supreme Court pointed out, Bruton had not made a statement and the case against him was otherwise weak; thus if the jury had, contrary to instructions of the court, considered the Evans statement at all against Bruton, it would have been devastating. Here petitioners had made confessions that were in substance the same as the Hurd and Harris confessions, and petitioners' confessions were admissible and were admitted in evidence against them. For this reason alone, there is at least a serious question as to whether the *Bruton* rule applies to the Hurd and Harris confessions.

[fol. 8]

We think, however, that there is a clearer reason why *Bruton* was not applicable to the Hurd and Harris statements. This reason is that, although the state trial judge at the trial considered the Hurd and Harris statements not admissible as to petitioners and so charged the jury, it appears that, as the state appellate court later determined, such were actually admissible against petitioners. We reach this conclusion from the proof that the officers questioned petitioners and Hurd and Harris as a group and they in the presence of each other gave the officers the information as to which was involved in which robbery and so adopted

each other's statements. Moreover, the typed "We" statements taken from Hurd and Harris and petitioners on the afternoon of December 9th, all in substance the same concerning this robbery, were taken in the presence of each other and under circumstances that indicate adoption by each of the statement of the other.

Since, as we have determined, the "We" confessions of Hurd and Harris were actually admissible as to petitioners, we do not believe that it was a violation of *Bruton* not to sever the case against Hurd and Harris from that against petitioners. If the guilty pleas of Hurd and Harris can be said to be an assertion of guilt as to petitioners such assertion of guilt was encompassed by the confessions of Hurd and Harris that could have, though they were not, admitted in evidence against petitioners.

It is therefore ORDERED that the prayer
[fol. 9] for relief in the petitions for writ of habeas corpus are denied and the actions are dismissed.

ENTER this 3 day of May, 1973.

/s/ BAILEY BROWN
CHIEF JUDGE

APPENDIX B

[fol. 1]

No. 73-1806
No. 73-1807
No. 73-1808

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

WILLIE GLINSEY,
Appellant,

v.

H. L. PARKER, Superintendent Shelby County Jail,
Appellee.

ARTHUR FRANKLIN,
Appellant,

v.

H. L. PARKER, Superintendent Shelby County Jail,
Appellee.

EUAN BAILEY,
Appellant,

v.

H. L. PARKER, Superintendent Shelby County Jail,
Appellee.

APPEAL from the United States District Court for the Western District of Tennessee

Decided and Filed February 13, 1974

Before: PHILLIPS, Chief Judge; PECK and LIVELY, Circuit Judges.

Opinion

[fol. 2] LIVELY, Circuit Judge. The petitioners, Glinsey, Franklin and Bailey, appeal the orders of the district court which denied them habeas corpus relief. All are serving penitentiary sentences imposed in state court proceedings in which they were found guilty by a jury of committing armed robbery. Following a two-day evidentiary hearing, the district court filed an opinion in which three constitutional issues that had been raised by petitioners were considered. In denying habeas corpus writs the district court found that the arrests, interrogation and state court proceedings which resulted in the petitioners' imprisonment did not violate their constitutional rights. In order to deal with the issues presented on appeal it is necessary to make a brief statement of the facts surrounding the arrest and trial of petitioners.

On the evening of December 8, 1969 the Memphis police picked up two young men named Hurd and Harris in connection with a holdup which had taken place earlier that evening. Hurd and Harris admitted their participation in the December 8 robbery and divulged to the police the fact that they had also been involved in approximately 13 other armed robberies which were unsolved at the time. In discussing the other robberies, Hurd and Harris implicated all three of the petitioners and one Frederick Johnson. Beginning shortly after 3:00 a.m. on December 9, 1969, the police, led by Lieutenant Hadaway who was then a detective lieutenant in the robbery bureau, arrested each of the petitioners and Frederick Johnson. Each petitioner was arrested at his home in the presence of an adult and all were taken to police headquarters and then to juvenile court where their names, addresses, telephone numbers and family information were recorded. A juvenile court attendant notified the parents of each petitioner of the arrests, the charges and the fact that they were not eligible for re-

lease because of the seriousness of the charges. Each one was checked physically to determine if any beating or mistreatment had taken place. All three petitioners and Frederick Johnson were taken back to the police
[fol. 3] station and placed in a room with Hurd and Harris. Another youth who had been implicated by Hurd and Harris was released by the police when it was learned that he had only loaned a gun to Hurd and Harris and had not actually participated in any of the holdups.

By the time the petitioners were first brought to the police station, Hurd and Harris had already admitted the armed robbery of a liquor store on November 29, 1969 and had implicated all three petitioners and Frederick Johnson. The six suspects were questioned intermittently for approximately 12 hours beginning about 5:00 a.m. Since the three petitioners were 17 years of age, they were taken back to juvenile court for nearly two hours around the middle of the day on December 9 for preliminary disposition of their cases. Food was available to them during this period. The juvenile judge entered an order bringing them within the protective custody of the court but ordering detention pending a hearing which was set for December 15. Between 3:00 and 5:00 p.m. on December 9 all six suspects signed written confessions in the presence of each other in which they admitted taking part in the November 29 liquor store robbery. Before the petitioners and Johnson had made any statements they requested the police to leave them alone in the room with Hurd and Harris. This was done, and it was following a discussion among all six of the suspects that petitioners and Johnson agreed to give statements.

Many statements were taken by the police. At first the six suspects, while together, were asked about a number of separate robberies. An officer would describe the

date and place of the robbery and ask which ones of the suspects had taken part in that robbery. Those who had taken part would raise their hands, and notes were taken by another officer recording the names of those who admitted participation in each of the crimes. After the group session was completed, the officers began taking statements from each individual suspect concerning specific [fol. 4] robberies. These statements were written in long hand, signed by the suspects and were referred to by the police as "I" statements. Each of the petitioners made such a confession with respect to the November 29 liquor store robbery.

Following their return from juvenile court at about 2:00 p.m. on December 9, the petitioners and Johnson, Hurd and Harris were questioned in the presence of a stenographer who typed all the questions and answers. In the presence of each other all six suspects admitted certain robberies, including the one involving the liquor store on November 29, and typed statements were signed. These were referred to by the police as "We" statements. Each statement contained a *Miranda* type warning above the body of the confession.

On December 15, 1969 juvenile court ordered the petitioners remanded to the sheriff for disposition of the charges under the criminal laws of Tennessee on a finding of probable cause that they had committed the crimes charged. All were subsequently indicted for armed robbery in connection with the November 29 liquor store holdup and the court ordered all six defendants to be tried together. Each defendant moved for a severance, but the motions were denied.

Prior to the trial, Hurd and Harris had agreed to plead guilty and the State offered to recommend a 25-year sentence

if all six defendants would plead guilty. Armed robbery was a capital offense in Tennessee at that time. The petitioners and Johnson refused this proposition and entered not guilty pleas. After the jury had been impanelled, Hurd and Harris pled guilty in the presence of the jury and the other four defendants pled not guilty. Because the jury fixes punishment under Tennessee criminal practice, Hurd and Harris remained as defendants and their cases were submitted to the jury for the purpose of fixing punishment along with those of the other defendants. Before the end of the trial, Frederick Johnson changed his plea to guilty.

[fol. 5] All three petitioners took the stand and repudiated the confessions which they had made on December 9, 1969. Hurd, Harris and Johnson did not testify, but the "We" statements of all six defendants confessing the November 29 robbery and implicating the others were introduced at the trial. The jury was instructed both at the time the statements were introduced and in the final charge that admissions could not be considered as evidence against any defendant other than the one who had made the admission. The jury determined the guilt of the petitioners and fixed their punishment at the same time that it fixed the punishment of Hurd and Harris and Johnson.

After exhausting their state remedies the three petitioners brought this action, alleging that the confessions introduced at the trial were not freely and voluntarily given, but were the result of coercion; that they were denied their Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses against them; and, that the denial of a severance and subsequent use of the "We" statements in the trial was a violation of due process under the Fourteenth Amendment.

In addition to conducting a hearing, the district judge had before him the entire record of proceedings in the state courts. The district court found that at the time of arrest and prior to interrogation the petitioners were clearly advised of their rights and that they never requested counsel nor were deprived of their right to counsel. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964). The court found that there were no threats or promises and that the confessions of the petitioners were freely and voluntarily given. It was pointed out in the court's memorandum that the petitioners had confessed to the November 29 liquor store robbery in the morning of December 9 and shortly thereafter had signed "I" statements. The "We" statements which were introduced at the trial of the petitioners, although taken near the end of twelve hours of interrogation, were consistent with the oral confessions and the "I" statements which were taken near the beginning of the period of interrogation. We are mindful of the extreme care which [fol. 6] must be exercised in determining whether a confession given by a juvenile charged with a serious crime is voluntary or coerced. *Haley v. Ohio*, 332 U.S. 596 (1948); *Gallegos v. Colorado*, 370 U.S. 49 (1962). We believe from examining this record that the experienced and able district judge did closely scrutinize the facts and circumstances surrounding these confessions and that his findings and conclusions that the admission into evidence against them of the petitioners' own confessions was not a violation of their federal constitutional rights are fully supported by the record. *Waddy v. Heer*, 383 F.2d 789, 793 (6th Cir. 1967), *cert. denied*, 392 U.S. 911 (1968).

The second issue in the case arises under the confrontation clause of the Sixth Amendment which provides in part as follows: "In all criminal prosecutions, the accused

shall enjoy the right . . . to be confronted with the witnesses against him . . ." In *Pointer v. Texas*, 380 U.S. 400 (1965), the Supreme Court held that the right to confront witnesses and cross-examine them is essential to a fair trial and is made applicable to the states by the Fourteenth Amendment. Petitioners maintain that the introduction of the "We" confessions of Hurd and Harris at the joint trial constituted a violation of their right of confrontation and cross-examination under the Supreme Court holding in *Bruton v. United States*, 391 U.S. 123 (1968). There the Supreme Court held that a statement of one defendant who does not testify and which implicates another defendant in the crime for which they are on trial may not be introduced in a joint trial since the right of confrontation and cross-examination is denied the co-defendant. The Court held that even clear instructions to disregard such a statement as evidence against the co-defendant, as were given in the present case, do not make it admissible. The Court reasoned that the jury was likely to believe the portions of the statement implicating Bruton and that thus substantial weight was added to the prosecution's case against him by the use of inadmissible evidence.

In *Dutton v. Evans*, 400 U.S. 74 (1970),
[fol. 7] the Supreme Court held that the confrontation clause does not preclude the use of all hearsay evidence in a criminal trial and upheld the admission of testimony which recounted a statement of an alleged co-conspirator. This testimony had been permitted in evidence under a state rule which allowed statements of co-conspirators to be introduced as evidence against other members of a conspiracy. The case is distinguishable from *Bruton* in that it involved a separate rather than a joint trial and the witness who related the alleged statement of the co-conspirator was cross-examined at length.

In *Campbell v. United States*, 415 F.2d 356 (6th Cir. 1969), this court held that an out-of-court statement of a co-conspirator could be admitted in a joint trial because of a federal rule permitting such testimony to be received as evidence against other members of the conspiracy. This court held that the *Bruton* rule is limited to situations where the out-of-court statements are *inadmissible* hearsay and has no application to situations where the extra-judicial statement is admissible under the narrowly defined co-conspirator exception to the hearsay rule.

In considering this issue in the present case the district judge found that the "We" confessions of Hurd and Harris were actually admissible as to the petitioners because the six suspects each adopted the statements given by the others as the officers questioned them as a group. The district court thus reasoned that the state trial court could have received the "We" statements of Hurd and Harris as evidence against these petitioners the same as the statements which petitioners themselves had given because they were "adoptive statements." The petitioners were present when Hurd and Harris gave the statements which were introduced at the trial. Their adoption of such statements was inferred from the similarity between the statements of Hurd and Harris and their own statements and the failure of petitioners to object or specifically disavow the statements of Hurd and Harris at the time they were made.

[fol. 8] This court has had occasion to deal with the issue of an adoptive statement in a recent case. In *Miller v. Cardwell*, 448 F.2d 186 (6th Cir. 1971), *cert. denied*, 405 U.S. 1033 (1972), one Swiger made a statement in Miller's presence which was recorded on an electric device. Following the completion of Swiger's statement, Miller was asked by the officers whether the

statement was true and he eventually ratified Swiger's statement and this was recorded as well. At Miller's trial the recording was played following correct instructions to the jury to the effect that it should consider Swiger's statement as evidence against Miller only if the jury found that Miller had accepted Swiger's statement as his own. Following conviction, Miller sought a writ of habeas corpus asserting that he was denied his right to confront witnesses and cross-examine them by the admission of Swiger's out-of-court statement. We held that Miller's constitutional rights had not been violated since he adopted the statement of Swiger as his own and thus made it admissible against him.

The case before us now raises the issue of whether petitioners can be held to have adopted the statements of Hurd and Harris by reason of their silence upon hearing such statements given. Of course all were in custody when the statements were given and this court has long held that no derogatory inferences may be drawn from the silence of a person who is in custody and accused of crime. *McCarthy v. United States*, 25 F.2d 298 (6th Cir. 1928). One in custody has the right to remain silent and it would violate rights guaranteed by the Fifth Amendment to hold that such a person, by his silence, has acquiesced in a statement made by another in his presence which implicates him in a crime. See *Miranda v. Arizona*, *supra*, 384 U.S. 436 at 468, n. 37. In reversing the conviction in the *McCarthy* case, the court noted that the defendants later took the stand and denied all connection with the crime as was done here. The holding of *McCarthy v. United States*, *supra*, was reaffirmed in a recent case where it was held that an admission by silence, made while the defendant on trial and the maker of an inculpatory statement were undergoing police interrogation and at the time when they were

[fol. 9] obviously accused of having committed an offense, may not be received in evidence. To permit the jury to treat silence of one accused and in custody as an admission of guilt would contravene that person's rights under the Fifth Amendment to remain silent. *United States v. McKinney*, 379 F.2d 259 (6th Cir. 1967). In *United States v. Brinson*, 411 F.2d 1057 (6th Cir. 1969), the decisions in *McCarthy* and *McKinney* were relied upon in holding that the use of the fact that a person accused of a crime remains silent against such person is an error of constitutional magnitude.

Hurd and Harris did not testify at the joint trial. Thus there was no opportunity for the petitioners' counsel to cross-examine Hurd and Harris concerning the contents of the statements. As the Supreme Court said in *Pointer v. Texas*, *supra*, ". . . a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." 380 U.S. 400 at 406-407. The petitioners cannot be held to have waived their right of confrontation and cross-examination by their silence in the police station when Hurd and Harris made statements which implicated them. The right to confrontation and cross-examination is meaningful only if it can be exercised in the presence of the jury which is charged with deciding the question of guilt or innocence. We therefore hold that the silence of petitioners in the face of incriminating statements of Hurd and Harris cannot constitutionally be held to be an adoption of such statements under the circumstances of this case.

On the basis of the finding that each of the defendants had adopted the statements of the others, the district court also held that it was not a violation of due process for the

trial court to refuse to sever the Hurd and Harris cases from those of petitioners, stating, "If the guilty pleas of Hurd and Harris can be said to be an assertion of guilt as to petitioners such assertion of guilt was encom-
[fol. 10] passed by the confessions of Hurd and Harris that could have, though they were not, admitted in evidence against petitioners." While we do not agree that the petitioners adopted the confessions of Hurd and Harris, this nevertheless is not dispositive of the issue of severance. The matter of severance is always addressed to the sound discretion of the trial judge and accordingly is only reviewable for abuse. *United States v. Ethridge*, 424 F.2d 951 (6th Cir. 1970), *cert. denied*, 400 U.S. 993 (1971). Though there appears to be little reason for joining guilty-pleading defendants with those pleading not guilty even under Tennessee practice where the jury must set the punishment of those pleading guilty, still we cannot say that this joinder standing alone was prejudicial to the petitioners. Compare *Crampton v. Ohio*, 402 U.S. 183, 208-222 (1971). It is conceivable that such a joint trial could be conducted without the use of the Hurd and Harris confessions and, if so, it would not be an abuse of discretion to deny severance.

One other point needs to be considered in this case. The district court found that all of the "We" statements were in substance the same concerning the November 29 liquor store robbery. Since the petitioners' own statements were found to be admissible against them, if the statements of Hurd and Harris which were admitted were identical with those of the petitioners in every material detail, such statements might be considered merely cumulative evidence and their admission harmless error. In *Harrington v. California*, 395 U.S. 250 (1969), while holding that the rule of *Bruton* applies to state prosecutions, the Supreme

Court refused to set aside a conviction where the other co-defendants were tried jointly with Harrington over his objection that there should be a severance. The confessions of each of the four defendants were introduced into evidence with limiting instructions and one of them took the stand and was cross-examined. The other two co-defendants did not testify. The Supreme Court affirmed the conviction of Harrington, holding that in view of the other evidence of guilt the introduction of statements [fol. 11] of co-defendants was merely cumulative evidence and was harmless beyond a reasonable doubt.

At a joint murder trial where neither defendant took the stand, a police officer in *Schneble v. Florida*, 405 U.S. 427 (1972), testified to certain admissions by each of the defendants implicating both of them in a murder. Both were convicted and the conviction of one defendant (Snell) was reversed by the Florida Supreme Court after remand from the United States Supreme Court. Nevertheless, the Supreme Court affirmed the conviction of the other defendant (Schneble) on the ground that any violation of the *Bruton* doctrine which had occurred at the trial was, as to him, harmless beyond a reasonable doubt. The admissions of Schneble were held to be voluntary and admissible against him, but he contended that the introduction of his co-defendant's out-of-court statement deprived him of a constitutional right. The Court held that there was independent evidence of guilt which was overwhelming and that the allegedly inadmissible statement of the co-defendant merely tended to corroborate details of the petitioner's own comprehensive confession. Holding that there was no rational hypothesis on which the jury could have found Schneble guilty without reliance on his own confession the Court stated, "In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the co-defendant's

admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." 405 U.S. at 430.

We have examined the trial transcript of the state proceedings against the appellants. Aside from the statements which were introduced, there is no evidence linking Glinsey or Bailey with the November 29 robbery. Franklin was positively identified by an employee of the liquor store as one of the holdup men. The same witness identified Hurd, but was unable to identify either of the other participants, though the statements of all agreed that Hurd and the three appellants took part in the robbery inside the [fol. 12] store while the other two remained in the car.

We find the error in the introduction of the Hurd and Harris statements to be harmless beyond a reasonable doubt insofar as it affected the trial of Franklin. His own confession in conjunction with the positive identification by a victim of the robbery constituted overwhelming evidence of guilt. *Schneble v. Florida*, *supra*. We find no such overwhelming evidence of guilt outside of the improperly admitted statements with respect to Glinsey and Bailey.

The judgment of the district court is affirmed in No. 73-1807; it is vacated in Nos. 73-1806 and 73-1808 and these cases are remanded with directions to grant writs of habeas corpus to the petitioners Glinsey and Bailey unless the State of Tennessee shall grant them new trials within a reasonable time to be fixed by the district court.